Judges at Odds Over Legality of Obamacare Subsidies

By: Pema Levy
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On Tuesday, two federal appeals courts handed down conflicting rulings in two identical cases that threaten to destroy the Affordable Care Act (ACA) in much of the country. In the morning, a three-judge panel on the D.C. Circuit Court of Appeals struck a disastrous blow to the law. A few hours later, a panel of the Fourth Circuit Court of Appeals unanimously reached the opposite conclusion.

The two cases, *Halbig v. Burwell* in the DC Circuit and *King v. Burwell* in the Fourth Circuit, turn on the question of subsidies for insurance bought through the insurance marketplaces. The question is whether the subsidies for individuals purchasing insurance on the exchanges, administered by the Internal Revenue Service in the form of premium assistance tax credits, are available to every qualifying individual, or only for people who bought insurance through a state-run exchange. It may seem like a technicality, but it could ultimately deprive millions of people access to affordable health coverage.

Because 36 states opted not to create an exchange, forcing the federal government to step in, the suit ultimately threatens the availability of affordable health insurance in much of the country. Moreover, without subsidies, the lack of an affordable coverage option would render the individual and employer mandates unenforceable in those states.

Despite these drastic results, two Republican-appointed judges on the DC Circuit found that the plain text of the law does indeed limit subsidies to state-run exchanges; the lone Democratic-appointed judge on the panel dissented, calling the lawsuit an “attempt to gut” the law.

Meanwhile, three Democratic-appointed judges on the Fourth Circuit panel (one of the judges was a recess appointment by President Bill Clinton and re-appointed by President George W. Bush), unanimously found that subsidies should be available to anyone who qualified, no matter what state they are in.

The ACA stipulates that subsidies should be allotted for plans purchased “through an Exchange established by the State under Section 1311.” The plaintiffs in both suits claim that this plain text of the law clearly means subsidies are only available through state-run exchanges. But the

government and the ACA's backers call this argument absurd. Their argument is that the law instructs the federal government to take on the role of the state to set up exchanges when individual states do not, meaning that the exchanges should be considered equivalent no matter if they are run by the state or the federal government.

The Supreme Court precedent holds that when a law's text is ambiguous, federal agencies have the right to carry out the law in a manner consistent with the purpose of the law, a doctrine known as "deference."

This is where the two circuit court panels diverged Tuesday. The DC Circuit panel found that the "plain meaning" of the law is that subsidies are only available in state-run exchanges. "[A]pplying the statute's plain meaning, we find that section 36B unambiguously forecloses the interpretation embodied in the IRS Rule and instead limits the availability of premium tax credits to state-established Exchanges," DC Circuit Judge Thomas Griffith wrote in his majority opinion.

The argument against the IRS rule largely follows the argument suggested by two conservative lawyers who helped make the Halbig and King cases a reality: Jonathan Adler, a law professor at Case Western Reserve University in Ohio, and Michael Cannon, a health care policy expert at the libertarian Cato Institute in Washington, D.C. The two men helped create the legal argument behind the Halbig case. As part of his anti-Obamacare crusade, Cannon spent years traveling the country and urging states not to set up their own exchanges.

"The heart of the decision today is a reaffirmation of the principle that the law is what Congress enacts, not what some may have wanted Congress to enact and not what some with the benefit of hindsight wish Congress had done differently," Adler said Tuesday on a conference call with reporters, responding to the DC Circuit's ruling,

The Fourth Circuit, however, reached a very different conclusion. Rather than finding the language clearcut, the majority opinion found "the statute is ambiguous and subject to at least two different interpretations." Following Supreme Court precedent, the panel's job was then to assess whether the IRS's interpretation of the statute is reasonable, and if so, accord the IRS deference to carry out the law as it sees fit.

"Confronted with the Act's ambiguity, the IRS crafted a rule ensuring the credits' broad availability and furthering the goals of the law," the majority opinion reads. "In the face of this permissible construction, we must defer to the IRS Rule."

In a concurrence, one judge on the panel went further than his colleagues in saying that the plain text of the statute supports the government's argument -- the exact opposite of the DC Circuit's finding.

Both sides on this issue know that the stakes are high and that if the federal government case ultimately fails, the health care law could fall apart. "[Ou]r ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal Exchanges and for health insurance markets more broadly," Judge Griffith wrote in his opinion

striking down the IRS regulation. “But, high as those stakes are, the principle of legislative supremacy that guides us is higher still.”

“I think it’s a ruling that has potential consequences that would be disastrous for the Affordable Care Act and along the way engages in a reading of the statute that makes no sense as a legal interpretation matter,” said Elizabeth Wydra, chief counsel for the left-leaning Constitutional Accountability Center (CAC), who filed an amicus brief on behalf of the government in Halbig.

“It’s very to see how you reach the result that the two judges did today without buying into the quest to strike [at] the heart of the ACA,” Wydra said.

Indeed, of the more than eight million Americans who signed up to buy health care through an exchange, about five and a half million did so through federally-run exchanges. According to the *New York Times*, most of those people qualified for a subsidies to help cover their premiums.

Both sides on this issue argue that they are clearly in the right. Cannon and Adler contend that the law’s text clearly only provides subsidies in state-run exchanges. The government and its supporters say that clearly goes against the intent of the law, which is to provide coverage to every American.

Cannon and Adler argue that Congress intended to withhold subsidies as a carrot-and-stick method of forcing states to set up exchanges. Obamacare’s supporters say that Congress would not have been so stupid as to give Republican governors the ability to destroy the law. Moreover, if the subsidies were intended to be a carrot, they argue, it would have said so explicitly.

With these two dueling opinions, more judges will soon be weighing in on these questions. There are similar cases pending before other courts. Meanwhile, the Department of Justice has indicated that it will ask the full DC Circuit to review the panel’s ruling, what is called “en banc” review. With more Democratic appointees than Republican ones, ACA supporters expect their view to prevail upon review.

“Of the eight judges who have now considered the plaintiffs' rather absurd challenge to the meaning of the ACA, six have decisively rejected these claims,” Doug Kendall, president of CAC, said in a statement Tuesday, referring to district and circuit court findings on the issue. “We are confident that the *en banc* D.C. Circuit will follow suit in the near future.”

The question now is whether the matter will ultimately end up before the Supreme Court. The justices are more inclined to take cases on matters where the circuit courts disagree—so if the DC Circuit ultimately reverses its panel decision and sides with the Fourth Circuit, it’s possible there will be no split, reducing the likelihood that the Supreme Court would take the case.

Two years ago, conservative Chief Justice John Roberts surprised the country when he provided the crucial vote to uphold the individual mandate, allowing the law to take effect. But Roberts did make the Medicaid expansion optional, a move that has resulted in millions of Americans missing out on the benefits of the ACA.

Last month, the Roberts Court ruled against the government on the issue of whether religious business owners must provide contraception coverage to their employees under the health care law—a blow to the government's goal of contraception coverage but not a major threat to the ACA overall.

The Halbig and King cases would afford Roberts and the court's conservative majority another opportunity to deal a crippling blow to Obamacare -- if they are inclined to take it.